No. 90-36 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWARD GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly denied without a hearing petitioner's motion for specific performance, in which he alleged without support that his plea agreement included a condition that his federal sentence would run concurrently with a state sentence and that he would derive "good time and gain time" benefits available to state prisoners.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. I) is unreported, but the judgment is noted at 900 F.2d 265 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1990. The petition for a writ of certiorari was filed on May 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An indictment filed on October 25, 1985, in the United States District Court for the Northern District of Florida charged petitioner with conspiring to

import cocaine, in violation of 21 U.S.C. 952.[1] On February 2, 1987, trial began with the selection of the jury. The next day petitioner, represented by retained counsel, withdrew his not guilty plea and entered a plea of guilty to the charge. Because the change of plea came on the eve of trial, the parties did not prepare a written agreement. The district court, however, conducted an exhaustive inquiry into the voluntariness of the plea, pursuant to Fed. R. Crim. P. 11(c).

At the Rule 11 hearing, petitioner admitted his guilt, and his attorney discussed at length the terms of the bargain that had been struck with the government. The court was aware that petitioner also had been indicted in the Southern District of Illinois and could be charged in Florida state court. With regard to punishment, petitioner's counsel said that the government had agreed to advise the state grand jury about the plea and had no objection if the state court were to impose a sentence that would run concurrently with petitioner's federal sentence. The trial judge cautioned petitioner that he had no control over the actions of the state grand jury or the court in the Southern District of Illinois. Discussing a possible transfer of the Illinois charges for disposition in the Northern District of Florida pursuant to Fed. R. Crim. P. 20, the judge admonished petitioner that the failure of a Rule 20 transfer to materialize had no effect upon the instant proceeding. The court asked petitioner whether he understood that neither the prosecutor nor his own lawyer could control those events, and petitioner replied that he understood.

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[1] The statement of facts is taken from the government's brief in the court of appeals.

The court asked petitioner whether he understood the terms of the plea agreement. Petitioner replied that he did. He also told the court that no one had made any predictions or promises as to the sentence he would receive. At the end of the Rule 11 inquiry, the court accepted petitioner's guilty plea. On April 6, 1987, petitioner was sentenced to imprisonment for 15 years.

On August 3, 1987, petitioner filed with the sentencing court a motion requesting a reduction of the sentence and an order directing that his federal sentence be made to run concurrently with his state sentence. On January 14, 1988, the court reduced the prison term to 7½ years and recommended that petitioner be placed in a state institution. The court, however, did not agree to order that the federal sentence terminate at the same time as the state sentence.

2. On February 1, 1989, petitioner, represented by different counsel, filed with the sentencing court a motion alleging that part of the plea bargain was that petitioner's federal sentence would end at the same time as his state sentence. Petitioner claimed that on the morning of trial he was in possession of a plea agreement approved in the Southern District of Illinois with Rostyslaw Kindratiw, who was petitioner's co-defendant in that district and an unindicted co-conspirator (and government witness) in the Northern District of Florida prosecution. One condition of that agreement was that Kindratiw would be sentenced first in the state court; Kindratiw's sentence in the Southern District of Illinois would be ordered to run concurently with the state sentence; and Kindratiw would be allowed to benefit from the "good [time]" and "gain time" credits received by Florida state prisoners. Pet. App. II para.

4. Petitioner alleged that on the morning of his trial in the Northern District of Florida he advised the prosecutor and his own lawyer that he would plead guilty if he could receive the same deal as Kindratiw. According to petitioner, the government had agreed to his proposal. In his motion for collateral relief petitioner asked the court to order specific performance of that condition.

In response, the government denied that it had ever agreed to such an arrangement. The government pointed out that no such arrangement had been discussed at the plea proceedings, and that petitioner had not alleged the existence of any such agreement when he filed his earlier post-sentence motion requesting reduction of his sentence. The district court denied petitioner's motion for specific performance without a hearing. In an order dated May 9, 1989, the court stated that it had rejected petitioner's demand for a "coterminous sentence," and would have refused to order such a sentence even if the government had recommended it.

ARGUMENT

Petitioner claims that he is entitled to specific performance of his plea agreement, and he faults the district court for not holding an evidentiary hearing on his claim.

Summary dismissal of a claim for collateral relief is appropriate where the allegations, viewed against the record of the plea hearing, are clearly frivolous or false. *Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977). Petitioner's claim was properly rejected without a hearing.

The record does not support petitioner's claim that he had bargained for a coterminous sentence. The

written agreement that was reached in Illinois with co-defendant Kindratiw evidently had been drawn up only after lengthy negotiations that included input from the State of Florida. Petitioner, who pleaded guilty at the eleventh hour, must have been aware that the State was not a party to any agreement that the federal government and his counsel entered into.

Petitioner admits that the possibility of a sentence running concurrently with any imposed by the State was not mentioned at all during the Rule 11 hearing. Pet. 12. The record of that hearing shows that the court admonished petitioner that it had no control over what Florida might do; the record also shows that petitioner acknowledged that all the terms of his plea agreement had been revealed in open court. Consequently, petitioner's present claim is inconsistent with unambiguous representations made on the record when petitioner entered his guilty plea.

Petitioner points to no special circumstances that might support the conclusion that he attached particular weight to the concurrent nature of the sentence meted out by the several jurisdictions when he decided to plead guilty. See *Hill* v. *Lockhart*, 474 U.S. 52, 60 (1985). Petitioner does not claim that he would have refused to plead guilty if he had known that he might not receive the same effective sentence in the state and federal systems. Nor did he provide any supporting evidence, in the form of an affidavit from his trial counsel (or anyone else), for his claim. And he did not explain why he waited several months to make his "coterminous sentence" claim, nor did he explain why he failed to raise that contention in the pleadings he filed prior to his motion for specific performance. Finally, petitioner did not allege that his own counsel advised him, rightly or wrongly, that he could expect to receive a "coter-

minous sentence" as part of his plea agreement. Under these circumstances, the courts below correctly held that petitioner's demand for specific performance was meritless and that no hearing was required before disposing of his claim. See *United States* v. *Caporale*, 806 F.2d 1487, 1516-1517 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); *McKenzie* v. *Wainwright*, 632 F.2d 649, 652 (5th Cir. 1980); *United States* v. *Flores*, 616 F.2d 840, 841-842 (5th Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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